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*Kevin L. Smith*

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ATTORNEYS FOR APPELLEE:

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 Indianapolis, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

Appellee-Petitioner.

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No. 49A05-1101-DR-28

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Kimberly Dean Mattingly, Judge Pro Tempore  
Cause No. 49D14-0603-DR-8893

**September 15, 2011**

**BARNES, Judge**

## **Case Summary**

Kathryn Richardson appeals the trial court's grant of Todd Richardson's post-dissolution petition to enforce a settlement agreement and the trial court's denial of her motion to correct error. We affirm.

## **Issues**

Kathryn raises two issues, which we restate as:

- I. whether the trial court judge had statutory authority to grant Todd's petition to enforce the settlement agreement; and
- II. whether the trial court properly granted Todd's petition to enforce the settlement agreement.

## **Facts**

On March 3, 2006, Todd filed a petition for dissolution of his marriage to Kathryn. Todd and Kathryn entered into a Property Settlement Agreement ("Agreement") as a result of mediation, and the trial court approved the Agreement and granted the dissolution on November 18, 2009. The Agreement divided the parties' various assets and liabilities and provided, in part:

### **PROPERTY RIGHTS**

#### **6. Real Estate.**

- a. Wife negotiates and pays Everhome Mortgage the settlement amount to dismiss with prejudice the foreclosure action vs. 3076 Dollsberry Lane, Nashville, Indiana within sixty (60) days of the Decree of Dissolution. Wife will quitclaim her interests in Dollsberry Land to Husband within ten (10) days of Decree of Dissolution. Wife's attorney will prepare the quitclaim deed and sales disclosure form.

Appellant's App. p. 13. Kathryn apparently quitclaimed the property to Todd. However, she obtained a dismissal of the foreclosure action without prejudice rather than a dismissal with prejudice.

On August 9, 2010, Todd filed a petition to set aside the Agreement based on mutual mistake. According to the petition, Todd thought that Kathryn was required under the Agreement to pay off the mortgage on the Nashville residence, but Kathryn thought that she was only required to reinstate the mortgage and Todd was required to pay the remainder of the mortgage. Todd alleged that, "This material mutual misunderstanding between the parties is substantial in nature as the mortgage is over \$50,000 and [Todd] conceded on many other issues to ascertain the marital residence free and clear of any mortgages." Id. at 23. In response, Kathryn filed a motion for summary judgment, arguing that Todd had failed to allege fraud, misrepresentation, duress, undue influence, or misconduct.

Todd then filed a petition to enforce the Agreement and a request for attorney fees. In this second motion, Todd argued that the Agreement required Kathryn to obtain a dismissal of the foreclosure proceedings with prejudice, but she only obtained a dismissal without prejudice. According to Todd, foreclosure proceedings had since been refiled.

At a hearing on the matter, Todd clarified that he was making two arguments: (1) there was a mutual mistake; and (2) alternatively, even under a clear reading of the Agreement, Kathryn had failed to obtain a dismissal with prejudice of the foreclosure proceedings. At the hearing, Todd testified that his understanding of the Agreement was that Kathryn had to pay off the mortgage. Kathryn relied upon her affidavit, which

provided that she complied with the Agreement and that the “decree/mediation allowed for Todd to keep the marital home and service that debt . . . .” Id. at 28.

The trial court granted Todd’s request to enforce the Agreement and ordered that Kathryn “shall comply with the Agreement in that she shall obtain a full release of the mortgage on the marital residence.” Id. at 8. The order was signed by “Kim Mattingly, PT Judge, Marion County Superior Court.” Id. Kathryn filed a motion to correct error, arguing that the Agreement did not require her to obtain a full release of the mortgage. The trial court denied the motion to correct error. Kathryn now appeals.

## **Analysis**

### ***I. Magistrate’s Authority***

Kathryn first argues that Mattingly did not have statutory authority to grant Todd’s petition to enforce the settlement agreement because she is a magistrate. In general, a magistrate must report his or her findings to the trial court, and the trial court “shall enter the final order.” Ind. Code § 33-23-5-9(a). Indiana Code Section 33-23-5-8 governs the powers of a magistrate judge and provides:

Except as provided under sections 5(14) and 9(b) of this chapter,<sup>[1]</sup> a magistrate:

(1) does not have the power of judicial mandate; and

(2) may not enter a final appealable order unless sitting as a judge pro tempore or a special judge.

Indiana Code Section 33-23-5-6 provides that a “magistrate may serve as a judge pro tempore or as a special judge of the court.”

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<sup>1</sup> Indiana Code Sections 33-23-5-5(14) and 33-23-5-9(b) are not applicable here.

Kathryn makes no argument other than pointing out these statutes and contending that the order was not approved by the trial court. Todd points out that Mattingly signed the order as judge pro tempore, as evidenced by the “PT” after her signature. Appellant’s App. p. 8. Kathryn does not reply to Todd’s argument that Mattingly signed the order as judge pro tempore. Under these circumstances, we cannot say that Mattingly, acting as judge pro tempore, lacked statutory authority to enter the order.

## ***II. Settlement Agreement***

Next, Kathryn argues that the trial court erred by granting Todd’s motion to enforce the Agreement. When dissolving a marriage, the parties are free to draft their own settlement agreement. Shorter v. Shorter, 851 N.E.2d 378, 382-83 (Ind. Ct. App. 2006). An agreement for division of property is economic in nature—an ordinary contract. Johnson v. Johnson, 920 N.E.2d 253, 256 (Ind. 2010). Courts therefore interpret settlement agreements using ordinary contract principles. Id. Thus, the goal of courts in interpreting a settlement agreement is to ascertain and give effect to the parties’ intent. Id.

Rules of contract construction and extrinsic evidence may be employed in giving effect to the parties’ reasonable expectations. Id. Unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning. Shorter, 851 N.E.2d at 383. Clear and unambiguous terms in the contract are deemed conclusive, and when they are present we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions. Id. Terms are not ambiguous merely because the parties disagree as to the proper interpretation of those terms. Id. When a contract’s

terms are ambiguous or uncertain and its interpretation requires extrinsic evidence, its construction is a matter for the fact-finder. Johnson, 920 N.E.2d at 256.

The Agreement required Kathryn to “negotiate[e] and pay[] Everhome Mortgage the settlement amount to dismiss with prejudice the foreclosure action.” Appellant’s Appendix at 13. According to Kathryn, it was sufficient for her to pay the amount necessary to bring the mortgage current and have the foreclosure action dismissed without prejudice.<sup>2</sup> Kathryn claims that “it made no difference legally whether the foreclosure was dismissed with or without prejudice.” Appellant’s Br. p. 6.

In support of her argument, she relies on Afolabi v. Atlantic Mortgage & Investment Corp., 849 N.E.2d 1170 (Ind. Ct. App. 2006). In Afolabi, we observed that “either party may move to dismiss a claim and a dismissal with prejudice constitutes a dismissal on the merits.” Afolabi, 849 N.E.2d at 1173. “[A] dismissal with prejudice is conclusive of the rights of the parties and is res judicata as to any questions that might have been litigated.” Id. We held that a prior foreclosure action, which was dismissed with prejudice pursuant to Indiana Trial Rule 41(E), did not bar a second foreclosure action due to subsequent and separate defaults under the note.

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<sup>2</sup> Kathryn also argues that the trial court improperly modified the property settlement agreement. “[P]roperty distribution settlements approved as part of a dissolution may be modified only where both parties consent or where there is fraud, undue influence, or duress.” Johnson v. Johnson, 920 N.E.2d 253, 258 (Ind. 2010); Ind. Code § 31-15-2-17(c) (“The disposition of property settled by an agreement described in subsection (a) and incorporated and merged into the decree is not subject to subsequent modification by the court, except as the agreement prescribes or the parties subsequently consent.”). Additionally, Kathryn argues that Todd was not entitled to relief under Indiana Trial Rule 60(B). See Poppe v. Jabaay, 804 N.E.2d 789, 793 (Ind. Ct. App. 2004) (“[W]hile there is no authority under the statute for the court to modify, rescind, or grant relief from the division of property under a dissolution of marriage decree, the statute does not preclude relief from judgment as provided under Ind. Trial Rule 60(B).”), trans. denied, cert. denied. The trial court here did not modify the parties’ Agreement; rather, it merely enforced the Agreement.

According to Kathryn, Afolabi stands for the proposition that “[e]ven if the case had been dismissed with prejudice a future foreclosure action could have been filed based upon a subsequent default in payment.” Appellant’s Br. p. 6. We cannot agree with Kathryn that Afolabi indicates she could obtain a dismissal without prejudice to satisfy the Agreement. The Agreement clearly and unambiguously required Kathryn to have the foreclosure action dismissed with prejudice. It is further clear that Kathryn failed to have the foreclosure action dismissed with prejudice. What is not clear from the Agreement, is what Kathryn was required to do in order to obtain the dismissal with prejudice. Because of the ambiguity, extrinsic evidence as to the parties’ intent was admissible.

Todd testified at the hearing that his understanding of the Agreement was that Kathryn had to pay off the mortgage and her failure to do so would create a great disparity in their bargained property settlement. Kathryn relied upon her affidavit, which provided that she complied with the Agreement and that the “decree/mediation allowed for Todd to keep the marital home and service that debt . . . .” Id. at 28. Kathryn’s affidavit did not specifically address the dismissal of the foreclosure proceeding with prejudice or how she was supposed to accomplish the dismissal. Her affidavit does not address Todd’s argument regarding the disparity in the division of property between the parties.

Given the Agreement’s ambiguous terms, construction of the Agreement was a matter for the fact-finder. Johnson, 920 N.E.2d at 256. The Agreement clearly required Kathryn to obtain a dismissal with prejudice of the foreclosure action, which she failed to do. The Agreement, however, was ambiguous as to how Kathryn was required to obtain

the dismissal with prejudice. Based on the extrinsic evidence, the trial court found that the Agreement required Kathryn to “obtain a full release of the mortgage on the marital residence.” Appellant’s App. p. 8. There was evidence in the record to support the trial court’s interpretation of the Agreement, and we decline Kathryn’s request to reweigh the evidence or reassess the credibility of the witnesses. The trial court did not err when it enforced the Agreement to require Kathryn to obtain a release of the mortgage.

### **Conclusion**

The magistrate was acting as judge pro tempore and had authority to enter the order. The trial court did not err by ordering Kathryn to obtain a full release of the mortgage. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.